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Letter Ruling 99-5: Nexus Based on the Presence of Leaseholds in Massachusetts

February 3, 1999

You request a letter ruling on behalf of ***** (the “Corporation”), ***** a corporation organized under the laws of the State of Washington. You ask whether the Corporation’s activities constitute “doing business” in Massachusetts for purposes of G.L. c. 63, § 39 and whether the Corporation is required to pay corporate excise tax under G.L. c. 63, § 39. You further ask whether the Corporation is “engaged in business” in Massachusetts for purposes of G.L. c. 64H § 1 and G.L. c. 64I § 1 and whether the Corporation is required to collect and remit sales and use taxes according to the provisions of G.L. c. 64H and c. 64I.

I. Facts

The Corporation is a retailer of tangible personal property. The Corporation generates sales through various business activities, including: retail stores and sales offices; direct sales representatives; mail order sales through catalogs and other promotional materials which are sent directly to consumers; and, through the Corporation’s Internet web page.

You state that the Corporation sold its direct sales division as of May 13, 1996 and that the Corporation no longer operates sales offices or employs sales people in Massachusetts.

You state that the Corporation plans to close its eight retail stores in Massachusetts, all of which have varying lease end dates, the longest running until November 23, 2000. You state that the Corporation is negotiating with landlords of the stores to terminate the leases. If the Corporation is unable to terminate the leases, you state that the Corporation plans to sublet the spaces.

You state that the Corporation will continue to operate its mail order business in Massachusetts; solicitations for orders will be conducted through catalogs, similar promotional mailings, and through the Corporation’s Internet web page. Aside from the leaseholds in Massachusetts, the Corporation will not have tangible personal property, inventory, employees, independent contractors, real property, business offices, or subsidiaries in Massachusetts.

II. Discussion of Law

Every foreign corporation doing business in the Commonwealth or using any part of all of its capital or any other property in the Commonwealth is responsible for paying the corporate excise imposed under G.L. c. 63, § 39. In addition, a vendor doing business in Massachusetts under M.G.L. c. 64H and 64I who has made a sale that is taxable under the Massachusetts sales and use tax statutes

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must collect a sales or use tax and file a sales or use tax return. G.L. c. 62C, § 16(h), (i). The following sections address each of these responsibilities in turn.

A. Corporate Excise Tax

In general, a foreign corporation is subject to the tax jurisdiction of Massachusetts pursuant to G.L. c. 63, § 39, if it does business in Massachusetts, or if it owns or uses any part or all of its capital, plant or any other property in the Commonwealth. The term “doing business” is defined by statute to include each and every act, power right, privilege, or immunity exercised or enjoyed in the commonwealth, as well as the buying, selling, or procuring of services or property. *Id.* Among the activities included in the term “doing business” are the execution of contracts and the exercise or enforcement of contract rights. 830 CMR 63.39.1 (4)(b).

Federal law provides immunity from the corporate excise tax for foreign corporations if the sole activity of the corporation is the solicitation by the corporation’s representatives of orders for the sale of tangible personal property, provided that the orders are sent outside of Massachusetts for approval or rejection, and provided that the orders are filled by shipment or delivery from a point outside the state. P.L. 86-272 (15 U.S.C. §§ 381 et seq.). Activities that fall outside the scope of solicitation are not protected by P.L. 86-272 unless they are *de minimis* within the meaning of *Wisconsin Dept. of Revenue v. William Wrigley, Jr. Co.*, 505 U.S. 214 (1992). See, e.g., *Aloha Freightways, Inc. v. Commissioner of Revenue*, 428 Mass. 418 (1998); *Amgen, Inc. v. Commissioner of Revenue*, 427 Mass. 357 (1998); *Kennametal, Inc. v. Commissioner of Revenue*, 426 Mass. 39 (1997), *cert. denied* 118 S. Ct. 1386 (1998).

Whether the activities of a foreign corporation fall within the protection of P.L. 86-272 is a factual determination. 830 CMR 63.39.1 (5)(e). The term “solicitation” is construed to mean only actual requests for purchases and activities that are entirely ancillary to requests for purchases. 830 CMR 63.39.1 (5)(e)(1). An activity is entirely ancillary to the request for purchases only if it serves no independent business purpose apart from its connection to the soliciting of orders. *Id.*

The Corporation continues to hold leases in Massachusetts, and plans to sublet those properties. By leasing property in Massachusetts, the Corporation is using part of its capital in Massachusetts and is procuring property in Massachusetts. Each of these incidents renders the Corporation liable for paying the corporate excise tax. This activity, which may also involve entering into contracts in Massachusetts, and ultimately enforcing those contracts in Massachusetts courts, has no relationship to solicitation of orders for tangible personal property, and serves an independent business function. These business functions are not protected by P.L. 86-272. Thus, the Corporation does not enjoy an exemption from the Massachusetts corporate excise tax. See *Wrigley*, 505 U.S. at 228.

B. Sales and Use Tax

Massachusetts imposes a five percent sales tax on sales of tangible personal property within the Commonwealth. See G.L. c. 64H, § 2. As a complement to the sales tax, Massachusetts imposes a five percent use tax on the storage, use or other consumption in Massachusetts of tangible personal property or services. See G.L. c. 64I § 2. The use tax ensures that Massachusetts vendors, who must collect sales tax on Massachusetts sales, are not placed at a competitive disadvantage to foreign vendors selling goods to Massachusetts customers.

Every vendor engaged in business in the Commonwealth and making taxable sales of tangible personal property is required to collect and remit to the Commonwealth sales or use taxes from purchasers. G.L. c. 64I, § 4.

The term “engaged in business in the Commonwealth” includes having a business location in the Commonwealth. G.L. c. 64H, § 1. The term “having a business location” includes owning or leasing real property within the Commonwealth. *Id.* By leasing or subletting real property in Massachusetts the Corporation has a business location in the state and is therefore engaged in business in Massachusetts within the meaning of G.L. c. 64H, § 1. The Corporation must therefore collect and remit the Massachusetts sales or use tax on its taxable sales of tangible personal property. See

National Geographic Society v. California Board of Equalization, 430 U.S. 551 (1977).

The term “engaged in business in the Commonwealth” is also defined to include regularly or systematically soliciting orders for the sale of services to be performed in Massachusetts or for the sale of tangible personal property for delivery to destinations in Massachusetts. G.L. c. 64H § 1. A vendor is engaged in business in the Commonwealth if it exploits the retail sales market in the state through solicitation materials sent through the mails or otherwise, including through computer networks. *Id.* Because the Corporation is systematically soliciting orders for sales to Massachusetts customers, and is exploiting the retail sales market through catalogs sent to Massachusetts and through the Internet, the application of the statute on its face results in the determination that the taxpayer is engaged in business in the Commonwealth. For further guidance on the application of the term “engaged in business in the Commonwealth,” see LR 99-1.

This determination meets the federal constitutional requirements set forth in *Quill Corporation v. North Dakota*, 504 U.S. 298, 311 (1992). *Quill* held that a vendor whose only contacts with the taxing state are by mail or common carrier lacks nexus sufficient to compel the vendor to collect and remit sales and use taxes. Due to the leaseholds, the Corporation’s activities in Massachusetts exceed those protected under the *Quill* case. Thus, it is constitutionally permissible for Massachusetts to enforce its definition of “engaged in business in the Commonwealth” with respect to the Corporation.

III. Conclusion

As discussed above, we find that the Corporation, through the presence of Massachusetts leaseholds, and the execution of contracts, owns or uses part of its capital, plant or other property in the state, and has procured property in the state. Therefore the Corporation is doing business in Massachusetts. The activities of the Corporation in Massachusetts are not protected by P.L. 86-272. We find that the Corporation is subject to the corporate excise tax.

We also find that the Corporation is “engaged in business in the Commonwealth” under the sales and use tax statutes. The leasing of real property in the Commonwealth creates a business location in the state and provides a taxable presence under the U.S. Constitution. The Corporation is therefore subject to the requirement to collect and remit sales and use taxes on sales of tangible personal property to Massachusetts customers.

Very truly yours,

/s/Bernard F. Crowley, Jr.

Bernard F. Crowley, Jr.
Acting Commissioner of Revenue

BFC:DMS:dt

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